Supreme Court, U.S.
FILED
MAR 8 - 2010
OFFICE OF THE CLERK

No. 091075

IN THE

Supreme Court of the United States

MERSEN GEORGIEVICH MARYANYAN, *et al.*,

Petitioners,

—v.—

ERIC H. HOLDER, JR., Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARTH MOLANDER
Counsel of Record
MOLANDER & ASSOCIATES
4875 Sunrise Highway, Suite 300
Bohemia, New York 11716
(631) 256-8495
garthmolander@mail.com

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Should a writ of certiorari be granted to review whether the Ninth Circuit Court of Appeals should have remanded for BIA reconsideration whether the Petitioner was eligible for asylum based upon being a member of a particular social group similarly situated and subjected to persecution in Russia, as error of law because the BIA failed to apply the correct legal standard in its analysis and its decision was contrary to controlling case precedent?

2. Should a writ of certiorari be granted to review whether the Ninth Circuit Court of Appeals should have remanded for BIA reconsideration whether the Petitioner was eligible for asylum based upon being a member of a "disfavored group" in Russia coupled with some evidence of individualized risk of being singled out for persecution, as error of law because the BIA failed to apply the correct legal standard in its analysis and its decision was contrary to controlling case precedent?

LIST OF PARTIES

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeals for the Ninth Circuit, the Honorable Robert Yeargin, Immigration Judge, Lauri S. Filppu, Panel Member, Board of Immigration Appeals, Homayun F. Zadeh, Esq., Kenneth S. Sogabe, Assistant Chief Counsel, Stephen Shaiken, Esq., and Lance L. Jolley, U.S. Department of Justice.

CORPORATE DISCLOSURE STATEMENT

None of the parties is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	8
I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE BOARD OF IMMIGRATION APPEALS FAILED TO APPLY THE CORRECT LEGAL STANDARD OF REVIEW IN DENYING ASYLUM TO THE PETITIONER	8

PAGE

A. The Ninth Circuit failed to remand to the BIA to apply the four-part *Sanchez-Trujillo* test regarding the Petitioner's eligibility for asylum as a member of a particular social group similarly situated..... 9

B. The Ninth Circuit failed to remand to the BIA to analyze the Petitioner's eligibility for asylum as a member of a "disfavored group" coupled with an individualized risk of being singled out for persecution..... 13

CONCLUSION 14

TABLE OF APPENDICES

Circuit Court Opinion (10/01/09)..... 1a

Order Denying Rehearing (12/08/09).... 4a

Decision of the Board of Immigration Appeals (10/10/06)..... 5a

Oral Decision of the Immigration Judge (05/23/05) 10a

TABLE OF AUTHORITIES

PAGE

Cases

Avetova-Elisseva v. INS,
213 F.3d 1192 (9th Cir. 2000) 10, 11

Gasisyan v. Mukasey,
292 Fed.Appx. 655
(9th Cir. 2008) 9, 10, 11, 13

Hernandez-Gil v. Gonzales,
476 F.3d 803 (9th Cir. 2007) 9

Hernandez-Montiel v. INS,
225 F.3d 1084 (9th Cir. 2000) 9

Hernandez-Ortiz v. INS,
777 F.2d 509 (9th Cir. 1985) 10

INS v. Cardoza-Fonseca,
480 U.S. 421, 107 S.Ct. 1207,
94 L.Ed.2d 434 (1987) 8

INS v. Ventura,
537 U.S. 12, 123 S.Ct. 353,
154 L.Ed.2d 272 (2002) 11, 14

Knezevic v. Ashcroft,
367 F.3d 1206 (9th Cir. 2004) 8

Lopez-Galarza v. INS,
99 F.3d 954 (9th Cir. 1996) 12

Martinez-Sanchez v. INS,
794 F.2d 1396 (9th Cir. 1986) 8, 11

Mgoian v. INS,
184 F.3d 1029 (9th Cir. 1999) 8, 11

PAGE

Sael v. Ashcroft,
386 F.3d 922 (9th Cir. 2004) 8, 13, 14

Sanchez-Trujillo v. INS,
801 F.2d 157 (9th Cir. 1986) 9, 10, 11

Velarde v. INS,
140 F.3d 1305 (9th Cir. 1998) 8, 12

Wakkary v. Holder,
558 F.3d 1049 (9th Cir. 2009) 9, 13

Agency Decision

Matter of Acosta,
19 I. & N. Dec. 211, 1985 WL 56042
(BIA 1985) 9

Constitution and Statutes

8 U.S.C. § 1101(a)(42)(A) 2-3

8 U.S.C. § 1158(a)(1) 2

8 U.S.C. § 1158(b)(1) 2

Regulation

8 C.F.R. § 208.13(b)(2)(3) 3-6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion *Maryanyan v. Holder, Attorney General*, 347 Fed.Appx. 306, 2009 WL 3157678 (C.A. 9) is dated October 1, 2009 and is reprinted as Appendix 1a-3a to this Petition.

The order of the United States Court of Appeals for the Ninth Circuit is an unpublished order for panel rehearing, which was denied on December 8, 2009 and is reprinted as Appendix 4a to this Petition.

The Order of the Board of Immigration Appeals in *Matter of Mersen Maryanyan, et al.*, under File No. A95-403-213/214/215/216, entered on October 10, 2006 is reprinted as Appendix 5a-9a of this Petition.

The Oral Opinion of the Immigration Judge in the *Matter of Maryanyan, et al.*, under File No. A95-403-213/214/215/216, entered on May 23, 2005 and is reprinted as Appendix 10a-31a in this Petition.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was entered on December 8, 2009.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Title 8 U.S.C. § 1158(a)(1) of the Immigration and Nationality Act, provides in pertinent part:

> (a) Authority to Apply for Asylum
>
> (1) In general
>
> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

Title 8 U.S.C. § 1158(b)(1) of the Immigration and Nationality Act, provides in pertinent part:

> (b) Conditions for Granting Asylum
>
> (1) In general
>
> The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Title 8 U.S.C. § 1101(a)(42)(A) of the Immigration and Nationality Act, provides in pertinent part:

(a) As used in this Act—

> (42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, . . .

Title 8 C.F.R. § 208.13(b)(2) of the Immigration and Naturalization Service, Department of Homeland Security Regulations, provides in pertinent part:

> (b) Eligibility.
>
> The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.
>
> (2) Well-founded fear of persecution.
>
> (i) An applicant has a well-founded fear of persecution if:
>
> (A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in

a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her

country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation.

For purposes of determinations under paragraph (b)(1)(i), (b)(1)(ii) and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In case in which the applicant has not established past persecution,

> the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.
>
> (ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

STATEMENT OF THE CASE

The lead petitioner, Mersen Maryanyan, is a native of Azerbaijan (Armenian ethnicity) and a citizen of Russia who entered the United States along with his wife and two daughters on July 4, 2001, at San Francisco, California on a B-2 visitor visa. A.R. 369-376. Mr. Maryanyan's sister was granted refugee status on July 14, 1993. A.R. 378. Mr. Maryanyan filed an affirmative asylum application with the former Immigration and Naturalization Service ("INS")—now, Department of Homeland Security ("DHS") pursuant to § 208 of the Immigration and Nationality Act ("INA") on March 13, 2002. A.R. 399-413. On November 17, 2003 Mr. Maryanyan's prior recommended approval of asylum was cancelled due to the manner he obtained his B-2 visitor visa. A.R. 284-285. Thereafter, on November 14, 2003, removal pro-

ceedings were instituted against the Petitioners with the filing of Notices to Appear ("NTA") with the immigration court, charging them with removability, under section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(B), as aliens who remained in the United States for a period longer than permitted. A.R. 433.

Petitioner appeared before an immigration judge on January 5, 2004, at which time he admitted allegation one, two and three but denied allegation four and conceded removability. A.R. 79-80. On May 23, 2005, after several hearings on the merits of the claims, the immigration judge rendered a decision, denying Mr. Maryanyan's applications for asylum, withholding of removal and protection under the Convention Against Torture ("CAT") and ordering the petitioners' removal to Russia. A.R. 50-75. Petitioners filed a timely appeal with the Board of Immigration Appeals ("Board"). A.R. 39. On October 10, 2006, the Board sustained in part and dismissed in part the immigration judge's decision. Appx. 5a-9a.

A subsequent appeal ensued to the Ninth Circuit Court of Appeals, who on October 1, 2009 denied the petition. *See, Maryanyan v. Holder, Attorney General*, 347 Fed.Appx. 306, 2009 WL 3157678 (C.A. 9, October 1, 2009). Appx. 1a-4a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE BOARD OF IMMIGRATION APPEALS FAILED TO APPLY THE CORRECT LEGAL STANDARD OF REVIEW IN DENYING ASYLUM TO THE PETITIONER.

Under the Supreme Court's view in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), a ten percent chance of persecution will support a "well-founded fear" of persecution. *Id.* at 431; *see, Velarde v. INS*, 140 F.3d 1305, 1310 (9th Cir. 1998); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004). It is an error of law to apply a more stringent standard than permitted under *Cardoza-Fonseca* in analyzing asylum eligibility. *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1399 (9th Cir. 1986). Under Ninth Circuit case law, an applicant can demonstrate a well-founded fear of persecution by either establishing a "pattern or practice of persecution of people similarly situated" without evidence of individualized persecution or proving that he or she is a member of a "disfavored group" coupled with a showing that he or she, in particular, is likely to be targeted as a member of that group. *Mgoian v. INS*, 184 F.3d 1029, 1035; *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). Furthermore, the more serious and widespread the threat of persecution to the "disfavored group," the less individualized the threat of persecution needs to be demonstrated by the applicant. *Sael, supra*,

386 F.3d at 925; *see also, Gasisyan v. Mukasey*, 292 Fed.Appx. 655 (9th Cir. 2008). Even less than a ten percent chance of individualized persecution is sufficient to establish eligibility for asylum. *Wakkary v. Holder*, 558 F.3d 1049, 1064 (9th Cir. 2009)("The more evidence of group targeting an asylum applicant proffers, the less evidence of individually specific evidence he needs to reach that ten percent").

A. The Ninth Circuit failed to remand to the BIA to apply the four-part *Sanchez-Trujillo* test regarding the Petitioner's eligibility for asylum as a member of a particular social group similarly situated.

The Ninth Circuit reviews de novo determinations by the BIA of purely legal questions concerning requirements of the INA. *Wakkary, supra*, 558 F.3d at 1056, *citing Hernandez-Gil v. Gonzales*, 476 F.3d 803, 804 (9th Cir. 2007). The Ninth Circuit considers the issue of eligibility for asylum on the basis of membership in a particular social group by applying a four-part test. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *see also, Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (the Court harmonized the *Sanchez-Trujillo* holding with *Matter of Acosta* immutability requirement).

Under the *Sanchez-Trujillo* test a four-part analysis includes: (1) whether the class of people identified is cognizable as a "particular social group;" (2) whether the applicant has established that he or she is a member of the group; (3) whether the social group has in fact been targeted

for persecution on account of the characteristics of the group members; and (4) whether such "special circumstances" are present to warrant regarding mere membership in that "social group" as constituting per se eligibility for asylum. *Id.* at 1574-1575. Moreover, a claim of persecution premised solely upon group membership is sufficient in itself to require a finding of eligibility for asylum. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515-16 n.6 (9th Cir. 1985); *see also, Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) ("Because there is no question that Avetova is Armenian, she merely has to demonstrate that Armenians are being systematically persecuted.").

In the case at bar, it is uncontroverted that Armenians are cognizable as a "particular social group" in Russia. A.R. 233-273. The 2005 Country Report clearly identifies Armenians as a class of people of dark skin who continue to be subjected to a pattern and practice of governmental persecution. *Gasisyan, supra*, 292 Fed.Appx. at 659. The Petitioner testified credibly that he was an Armenian residing in Russia with such immutable characteristics that identify this group. A.R. 120-124. Importantly, the immigration judge did not question the Petitioner's Armenian ethnicity. In fact, the immigration judge only found the petitioner's testimony regarding his 1995 and 1999 arrest as lacking credibility, since there were inconsistencies between the Petitioner's testimony and his asylum declaration. Appx. 18a-21a. On appeal, the BIA panel affirmed the adverse credibility determinations regarding the 1995 and 1999 arrests. Appx. 6a . It is further undisputed that the Ninth Circuit has held that the demon-

strated harassment of Armenians in Russia amounts to "persecution" under section 1101(a)(42)(A). *See, Avetova-Elisseva, supra,* 213 F.3d at 1202. Under the Petitioner's circumstances, mere membership in this particular social group qualifies him for asylum without individualized evidence of persecution. *Id.* at 1198, *citing Mgoian v. INS, supra,* 184 F.3d at 1035. Undoubtedly, the Petitioner meets the requirements of the *Sanchez-Trujillo* test and, therefore, qualifies for per se asylum.

Most disturbing in the immigration judge decision, the BIA panel decision and the Ninth Circuit decision is the fact that all fail to even mention the proper ten percent standard in analyzing whether the Petitioner met that standard given the Petitioner's membership in this particular social group. This legal analysis was patently ignored. Moreover, a reasonable factfinder would be compelled to conclude from the total record, which would include the 2005 Country Report, that a pattern or practice of persecution of Armenians existed in the Petitioner's country of removal. *Gasisyan, supra,* 292 Fed.Appx. at 659.

The immigration judge and BIA Panel analysis was insufficient as a matter of law and in conflict with controlling case precedent. The immigration judge and the BIA applied the incorrect standard of proof. Therefore, it is submitted that not to apply the proper one in ten standard was legal error and this error of law required remand for the BIA's reconsideration "under the proper standard." *INS v. Ventura*, 537,U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002); *Martinez-Sanchez, supra,* 794 F.2d at 1399.

Although the Ninth Circuit is limited to reviewing the administrative record, it considers the record in its entirety, including evidence that contradicts the BIA's findings. *Velarde, supra,* 149 F.3d at 1309. Moreover, the Ninth Circuit reviews discretionary denial of asylum for an abuse of discretion, and the BIA abuses its discretion if the decision is "arbitrary, irrational, or *contrary to law.*" (italics added). *Lopez-Galarza v. INS,* 99 F.3d 954, 960 (9th Cir. 1996).

The BIA's analysis was founded on an improper application of law in a number of respects. In the instant case, the immigration judge refused to consider the Petitioner's claim that his sister was granted refugee status as a displaced Armenian. The BIA failed to address other incidents outside of the Petitioner's 1995 and 1999 arrests, which should have been considered in analyzing whether the Petitioner had a reasonably objective fear of returning to Russia due to his inclusion in this particular social group. A.R. 385-388. The BIA adverse asylum determination was insufficient as a matter of law and contrary to controlling precedent case law, because it failed to consider relevant evidence as to whether the applicant was within a particular social group similarly situated and subject to a pattern and practice of persecution. By any objective measure, the applicant's fear of persecution was reasonable, and the BIA should have considered it on the merits of the evidence, under proper legal standards.

B. The Ninth Circuit failed to remand to the BIA to analyze the Petitioner's eligibility for asylum as a member of "disfavored group" coupled with an individualized risk of being singled out for persecution.

Armenians are a "disfavored group" in Russia. *Gasisyan, supra*, 292 Fed.Appx. at 659. Under a "disfavored group" analysis, the more evidence of group targeting an asylum applicant proffers, the less evidence of individually specific evidence he needs to reach the ten percent chance of persecution to be eligible for asylum. *Wakkary, supra,* 558 F.3d at 1064. In the context of asylum, only some evidence of individualized risk is necessary for the petitioner to succeed when the applicant is a member of a "disfavored group.". *Sael, supra*, 386 F.3d at 925.

In the case at bar, the Petitioner is undoubtedly a member of a "disfavored group" in Russia. *see, Gasisyan, supra*, 292 Fed.Appx. at 659. He credibly testified that he was Armenian, not to mention his birth certificate verified such inclusion. A.R. 369-376. Given the Petitioner's inclusion in this disfavored group "whose members are shown to have been widely targeted for discrimination, a substantial number of whom are shown to have been persecuted, is *relevant evidence* [italics added] in assessing whether the Petitioner's fear of being personally targeted for persecution in the future rises to the requisite level of objective reasonableness." *Wakkary, supra,* 558 F.3d at 1064. Surprisingly, none of the decisions even applied a "disfavored group" analysis in assessing whether the Petitioner was eligible for asylum. Simply put,

the immigration judge, the BIA panel and the Ninth Circuit panel all assumed that the IJ's adverse credibility findings regarding the Petitioner's 1995 and 1999 arrests precluded the Petitioner from qualifying for asylum under a "disfavored group" analysis. There is absolutely no mention of "disfavored group" in any of the decisions. However, since determinations must be considered on the record as a whole, and the Petitioner was clearly within this "disfavored group," the Ninth Circuit should have remanded for BIA reconsideration, in the first instance, whether the Petitioner provided some relevant evidence of individualized risk. *Ventura*, 537,U.S. at 16; *Sael, supra*, 386 F.3d at 925.

CONCLUSION

Petitioner respectfully submits that the Ninth Circuit erred in the following respects:

The Ninth Circuit should have remanded to the BIA to reconsider whether the Petitioner was eligible for asylum based on the protected ground of being included in a particular social group similarly situated, which group is subjected to a pattern and practice of persecution in Russia in light of the fact that the Petitioner was a member of this group and controlling case precedent had held Armenians are a persecuted group in Russia.

The Ninth Circuit should have remanded to the BIA to reconsider whether the Petitioner was eligible for asylum under a "disfavored group" analysis because controlling case precedent held that Armenians are a "disfavored group" subjected to systematic persecution in Russia and the Peti-

tioner is Armenian and he provided some evidence of individualized risk outside his testimony regarding his 1995 and 1999 arrests.

Therefore, Petitioner respectfully prays that the Court grant this petition for writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

GARTH MOLANDER
Counsel of Record
MOLANDER & ASSOCIATES
4875 Sunrise Highway, Suite 300
Bohemia, New York 11716
(631) 256-8495

Attorneys for Petitioners

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-75254

Agency Nos. A095-403-213
A095-403-214
A095-403-215
A095-403-216

Filed October 1, 2009

MERSEN GEORGIEVICH MARYANYAN; et al.,

Petitioners,

—v.—

ERIC H. HOLDER JR., Attorney General,

Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

MEMORANDUM*

Submitted September 14, 2009**

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Mersen Georgievich Maryanyan, his wife, Marina Nikolayevna Maryanyan, and their children, natives of the former Soviet Union and citizens of Russia, petition for review of the Board of Immigration Appeals' decision dismissing their appeal from an immigration judge's order denying their application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Our jurisdiction is governed by 8 U.S.C. § 1252. We review for substantial evidence the agency's adverse credibility determination. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002). We dismiss in part and deny in part the petition for review.

We lack jurisdiction to review Maryanyan's challenge to the BIA's denial of the request for voluntary departure for the lead petitioner. *See* 8 U.S.C. § 1229c(f) (no court shall have jurisdiction over an appeal from the denial of voluntary depar-

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

ture). Accordingly, we dismiss the petition as to his voluntary departure claim.

Substantial evidence supports the agency's adverse credibility determination based on the inconsistencies between Maryanyan's testimony and his asylum application with respect to the 1995 and 1999 arrests. *See Kohli v. Gonzales*, 473 F.3d 1061, 1071 (9th Cir. 2007) (discrepancies between petitioner's testimony and declaration, *inter alia*, substantially support adverse credibility finding). In the absence of credible testimony, Maryanyan failed to establish eligibility for asylum or withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003).

Finally, because Maryanyan's CAT claim is based on the same testimony that agency found not credible, and he points to no other evidence the agency should have considered, substantial evidence supports the agency's denial of CAT relief. *See id.* at 1156-57.

PETITION FOR REVIEW DISMISSED in part; DENIED in part.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 06-75254

Agency Nos. A095-403-213
A095-403-214
A095-403-215
A095-403-216

Filed December 8, 2009

MERSEN GEORGIEVICH MARYANYAN; et al.,

Petitioners,

—v.—

ERIC H. HOLDER JR., Attorney General,

Respondent.

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges

ORDER

Maryanyan's petition for panel rehearing is denied.

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW]

Date: October 10, 2006

Files: A95 403 213 - San Francisco
A95 403 214
A95 403 215
A95 403 216

In re: MERSEN GEORGIEVICH MARYANYAN
NARINA MERSENOVNA MARYANYAN
ALEKSANDRA MERSENOVNA MARYANYAN
MARINA NIKOLAYEVNA MARYANYAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

Homayun F. Zadeh, Esquire

ON BEHALF OF DNS:

Kenneth S. Sogabe
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture; voluntary departure

In a decision dated May 23, 2005, an Immigration Judge found the respondents removable as charged and denied their applications for relief. The respondents' appeal of that decision will be sustained in part and dismissed in part.

We can find no clear error in the Immigration Judge's determination that the lead respondent, on whose experiences the asylum and other applications were based, failed to provide credible testimony. The Immigration Judge relied on differences between the respondent's testimony and his application which revealed inconsistencies about his detention and interrogation by the Russian police in 1999 (I.J. at 9-10; *see* Tr. at 55-60. 85-88). In addition, the Immigration Judge pointed out that the respondent did not appear to remember his 1995 arrest which was described in his asylum application (I.J. at 11-13; *see* Tr. at 60-61, 89-94).

It is also clear that the respondent provided false testimony during his asylum interview regarding how he obtained visas for his family (Tr. at 66-80, 88, 114-15, 117). While this factor provides additional grounds to doubt the respondent's testimony, particularly since the lead respondent provided conflicting explanations as to how he obtained the visa and whether he was a guest of the Russian Consulate (I.J. at 14; Tr. at 66-80), it does not necessarily provide adequate evidence that the respondents filed frivolous asylum applications, as determined by the Immigration Judge (I.J. at 13-15). *See* section 208(d)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1158(d)(6). The lead respondent and his wife admitted that they had not been truthful about the visas during

the asylum interview because they feared the visas would be denied (Tr. at 74, 122). During the hearing before the Immigration Judge, however, they were truthful about their misrepresentations and, therefore, in this respect, did not provide false testimony in order to obtain further relief under immigration laws. While the lead respondent would not, as stated by the Immigration Judge, be able to establish the good moral character necessary for voluntary departure, he did not make the misrepresentations with the subjective intent of facilitating his asylum and other applications for relief from removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1157-58 (9th Cir. 2003) (citing examples from other circuit courts where a frivolous finding was upheld based on intentionally false statements made during the asylum proceeding). In sum, although there were inconsistencies in the lead respondent's testimony, with some information omitted or not adequately detailed during the hearing, the evidence is insufficient to find that the respondents' application rises to the level of a knowingly frivolous application for asylum as contemplated by section 208(d)(6) of the Act.

Since the lead respondent's false testimony was given during the five years prior to the respondents' applications for voluntary departure (in 2002), the Immigration Judge correctly found the lead respondent ineligible for voluntary departure pursuant to section 101(f)(6) of the Act. 8 U.S.C. § 1101(f)(6). *See* 240B(b) of the Act, 8 U.S.C. § 1229c(b): *see also Kungys v. United States*, 485 U.S. 759 (1988); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1053 n.3 (9th Cir. 2005) (presentation

of false testimony in order to procure an immigration benefit would preclude an alien from establishing good moral character). However, we do not agree with the Immigration Judge's denial of voluntary departure to the wife here. Although the wife admitted that she was aware that her husband would give false testimony and did not come forward with her knowledge once granted immigration benefits (*see* I.J. at 20-21; Tr. at 121-22), she did nothing to advance her husband's deception and her silence is insufficient, without further weighing the equities, to deny relief as a matter of discretion.

ORDER: The respondents' appeal is sustained in part and dismissed in part.

FURTHER ORDER: The respondents' appeal as to their applications for asylum, withholding of removal, and for relief under the Convention Against Torture is dismissed.

FURTHER ORDER: The Immigration Judge's decision finding that the respondents filed a frivolous asylum application is vacated.

FURTHER ORDER: The Immigration Judge's decision denying the lead respondent's (A 95 403 213) application for voluntary departure is affirmed; his decision denying the wife's (A95 403 214) request for voluntary departure is vacated.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondents (A95 403 214, A95 403 215 and A95 403 216) are permitted to voluntarily depart from the United States,

without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondents fail to so depart, the respondents shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondents fail to depart the United States within the time period specified, or any extensions granted by the DHS, the respondents shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

[ILLEGIBLE]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

May 23, 2005

File A 95 403 213
A 95 403 214
A 95 403 215
A 95 403 216

In the Matter of

MERSEN GEORGIEVICH MARYANYAN, NARINA NERSEONVNA MARYANYAN, ALEKSANDRA NERSENOVNA MARYANYAN, MARINA NIKOLAYEVNA MARYANYAN,

Respondents

IN REMOVAL PROCEEDINGS

Charge: Section 237(a)(1)(B) of the Immigration and Nationality Act (The Act), as amended—alien has remained in the United States for a longer time than permitted after admission as a non-Immigrant under Section 101(a)(15) of the Act;

Applications: Asylum and Withholding of Removal; Torture Convention Cancellation of Removal; Voluntary Departure

On Behalf of Respondents:

Homayun Zadeh, Esquire

On Behalf of the Government:

Evan Fronke, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents have denied the factual allegation that they have remained in the United States beyond January 3rd, 2003, without the proper authorization. (Exhibits 1, 1-A, 1-B, 1-C.) They have also denied the charge of removability as set out above, that they have remained in the United States for a longer time than permitted after admission as non-Immigrants. The Court notes the evidence in the record of the period for which each respondent was admitted. *See* Exhibit 2-6, 2-7, 2-8, 2-9. There is no evidence in the record of any extension granted to the respondents. The respondents have appeared for each of their Immigration Court hearings, going back to at least May 20th, 2004 before this Judge.

On the basis of the foregoing, the Court finds that the factual allegations have been sustained on the basis of the respondent's other admissions and the Court's finding of the factual allegations regarding their overstaying their period of admission, the Court finds that the charge of remov-

ability has been established by clear and convincing evidence.

Because the respondents have declined to designate a country of removal, the Court has directed Russia, pursuant to INA Section 241B, should such action become necessary.

The lead respondent, Mersen G. Maryanyan, has submitted an application for asylum under INA Section 208.[1] Exhibit 2. This application includes as derivative beneficiaries, his wife and two daughters. (*See* Exhibits 2-A, 2-B, 2-C). The form I-589 is, as to respondent, also considered a request for withholding of removal under Section 241(b)(3) and a request for relief under the Convention Against Torture. All four respondents have also applied for voluntary departure.

The Respondent's Claim:[2]

The respondent has applied for asylum and withholding on the basis of his race, his nationality and his membership in a particular social group. The respondent describes his ethnicity as "Caucasian." By this the Court understands the respondent to be referring to people from that part of Russia known as the Caucuses who have darker skin and darker hair than people from further north. The respondent's claim is based on mis-

---

[1] The application includes all named respondents. A spouse or child of an applicant who has been granted asylum may, if not otherwise eligible, be granted the same status as the principal alien.

[2] References to the respondent in this decision will be to the lead respondent, Mersen G. Maryanyan, file number A 95 403 213, inasmuch as the other three respondents are derivative beneficiaries of his application.

treatment that he said he received in Russia on the basis of ethnicity.

The respondent testified that he was born in Baku, Azerbaijan in 1961 when that was part of the Soviet Union. He testified that he is now a citizen of Russia. He testified that he is of Armenian background and that all Armenians had to leave Azerbaijan in 1988. He testified that he and his family went to Armenia where they stayed for one and a half years before moving to Russia in mid-1990.

He testified that he had many problems in Russia. He testified to one incident where he was stopped by the police in the street. He testified that he was asked why he did not have a propiska or lawful residence permit. He testified that a soldier called for a jeep and put him in it. He testified that he was taken to a nearby police station where he was beaten and insulted because of his ethnicity. He testified that he was held for a day and then released upon payment of a bribe and also a fine. He testified that this sort of thing happened on a daily basis. He testified that he was beaten practically ever time he was stopped. He testified that his children were not accepted and that nobody wanted to socialize with them.

The respondent testified that in the summer of 1993 or 1994, he also had problems with the Cossacks. He testified that a group of them broke into his house, claiming to be police. He testified that they started to search the place and that he was physically attacked, although he was not injured seriously. He testified that they wanted money and demanded 400 or 500 rubles, but accepted 200 when he said that was all he had. He testified that

they demanded that they leave the city within 20 hours. The respondent testified that the Cossacks helped the police clean Russian of Caucasians, as he put it. He testified that they were partners with the government and patrolled the streets. He was asked whether this incident was reported to the police and he testified that it was useless because the police and the Cossacks act together.

The respondent was asked whether there were any other specific problems. He testified that after the war started in Chechnya, in 1994, it brought out a lot of hatred for people with darker skin and darker hair. He testified that he looks like a Chechnyan to the Russians and that the attitude toward him and his family was very hostile.

He testified that in 1999, there was an explosion in a railway station in the city where he was living, that triggered more hatred. He testified that at the time of the explosion, he was working in another part of the railway station, loading cement. He testified that after work, he was on his way home when he was picked up and put in a mini-bus and taken to an auditorium. He testified that he told the police that he was not a Chechnyan. He testified that the police simply wanted him to confess to the bombing. He testified that he was beaten severely and given no food or water. He testified that two officers beat him with their fists and hands. He testified that he fell to the ground and they continued to kick him. He testified that they continued to insist that he take the blame for the railway station bombing. He testified that after the beating, he could not walk and he was taken back to the cell where he spent three or four days. He testified that he was not asked

more questions during this time. He testified that nobody came to the cell and he had the feeling, with other people in the cell, that they had been forgotten.

Respondent's counsel pointed out to him that his declaration said that he was interrogated twice a day during this time (*See* Exhibit 2-2 at paragraph 27). The respondent explained that after he was beaten, he wasn't called. He testified that he probably spent four or five days in custody after the beating and he was called once or twice a day.

Respondent's counsel pointed out to respondent that he had described incidents in 1994 and 1999 and asked him if he could remember anything else happening. He testified that things were happening continually. He testified that he could not remember anything else.

On cross-examination, the respondent was asked about the visa which he obtained to come to the United States. The respondent testified that this visa carries an annotation that the bearer is a "guest of Russian consulate, Seattle." (*See* Exhibit 2-6, respondent's passport at page 31). The respondent testified that he obtained the visa with the help of an old school friend from Azerbaijan who was then living in Moscow. He testified that this person's name was Boris Grigoryan. He testified that he did not know what this person was doing in Moscow. He testified that he was so scared at that time that he did not ask questions or clarify questions. He testified that this person took passports for him and his family. He testified that he signed a blank application. He testified that he was so afraid that he was ready to sign any application. He testified that the person who

was helping him asked for information, presumably to put on the application. He testified that this person did not explain what kind of an application was being submitted. The respondent testified that he could read the application, but he did not because he was in such a desperate situation. He testified that this person ultimately returned the family's passports with U.S. visas and helped them with tickets. The respondent testified that he never appeared at a U.S. consulate for an interview. He testified that he gave this person $3000 as to a friend because one has to pay for everything in Russia. The respondent emphasized that he did not know anybody at the Russian consulate in Seattle. In earlier questioning, he testified that he had no social contacts with anybody in the Russian government and that he was a simple person who had been a simple worker all his life.

The respondent was asked about his asylum office interview on April 10th, 2002. He was asked whether he had taken an oath at that interview and he said he did not remember. The record reflects that he did take an oath at that time. (indiscernible). The respondent testified that he did not remember if he had been told the consequences of filing a frivolous application. The record of the applicant's oath reflects that he was given such advisals.

The respondent was asked whether he had told the truth at the asylum office interview. He testified that he "mainly" told the truth. He testified that he lied about how he obtained the visas because he was so afraid that the petition would be denied. He testified that he told the asylum

officer he did not know how the annotation on the visa was put there. He testified that he said nothing at the asylum office about Boris Grigoryan. He testified that he told the asylum office that he did go to an interview for his visa.

The respondent was asked about the visa application. (Exhibit 6)[3]. The respondent conceded that the signature on the application was his, but it said that the handwriting used to fill in the application was not his. He testified again that he was so afraid at that time, that he was willing to sign anything. It was pointed out to him that the visa application reflects that the Russian government's ministry of foreign affairs confirmed an invitation to the respondent to visit the United States. (Exhibit 6 at page 2, *See also* Exhibit 3). The respondent testified that he was not a minister and not a diplomat and could not explain that notation.

The respondent was asked whether he had lied about anything else at the asylum office interview. He testified that he had lied about how he obtained the visa and that he had attended an interview, but nothing more.

Credibility:

In assessing the credibility of the respondent, I have taken into account the rationality, internal consistency, and inherent persuasiveness of his testimony. The Board of Immigration Appeals has stated that in reviewing IJ credibility findings, it

[3] The translation of the Russian language visa application is contained in the corresponding English language visa application attached to the Russian language application. Exhibit 6 and at pages 4-5.

looks to the record to see if the discrepancies and omissions described by the IJ are actually present, whether they are material, and whether the respondent has provided a convincing explanation. *In Re A-S-*, 21 I&N Dec. 1106 (BIA 1998).

In the present case, there are a number of matters which lead the Court to the conclusion that the respondent's application is not credible. The first of these concern the respondent's detention in 1999, at the time of the railway station bombing. The respondent had testified on direct examination that he had been severely beaten during this time. Government counsel pointed out that the statements in his declaration about this incident made no reference to any beating. *See* Exhibit 2-2 at paragraph 26. The respondent's explanation was that perhaps he omitted that from his declaration, but that he was beaten at which time he was taken to a police station. He was asked why it was not in his declaration and he conceded that perhaps he had not put it there. He said that he had pointed out that beatings happened practically every week and perhaps he did omit it in this case. He said that a person can forget what happens yesterday. The Court finds first that this is a material omission. Physical mistreatment, especially severe physical mistreatment makes a claim that much more serious and it is an important component of a persecution analysis. The Court must then consider respondent's explanation for not including it in his declaration but including it in his testimony. The Court finds that the respondent's explanation is not persuasive. If something this significant had happened to the respondent, it is reasonable to expect him to put it in his dec-

laration for the Court to consider. Respondent's addition of this facet of his claim at hearing, in the absence of any persuasive explanation for omitting it from his declaration, leads the Court to the conclusion that the respondent is attempting to enhance his claim at hearing. For the foregoing reasons, the Court finds respondent's application to be not credible in this regard.

There is another aspect of the respondent's testimony about the 1999 detention that troubles the Court. The respondent testified that after he was beaten, he was put back in a cell where he was held for three or four days. He testified that nobody came to the cell and he and others in the cell had the feeling that they had been forgotten. The respondent proffered his story on direct examination. When his counsel pointed out that his declaration said something different, mainly that he had been interrogated twice a day during this time, (*See* Exhibit 2-2 at paragraph 27). On cross-examination, the respondent was asked about this discrepancy, his explanation was that it was so hard to explain because so many things happened, so often. He testified that he was told by the people detaining him that they would lock him up and throw the key away, and hence, they had the feeling that they were forgotten. The Court finds that this discrepancy is material because it goes to the circumstances of respondent's detention. There is a dramatic difference between left in a cell for three or four days, to the point of feeling forgotten and being interrogated or called twice a day. It leads one to the question of whether one or the other description is the true one or whether the respondent was detained at all. The respondent's

explanation in this regard is not satisfactory because it essentially explains nothing. The Court, therefore, finds the respondent's application to be incredible in this regard.

On questioning by the Court, the Court attempted to elicit testimony from the respondent about an incident in November 1995 (*See* Exhibit 2-2 at paragraph 17). The Court resumed the line of questioning by respondent's counsel regarding any other incidents beyond those to which he had testified on direct examination that occurred in 1994 and 1999. The respondent first testified on questioning by the Court, to an incident in September 1996. (*See* Exhibit 2-2, at paragraph 20).

The Court then asked him whether anything else had happened. He testified that every year it was the same. He testified that there were arrests and that when he was stopped, he was usually arrested. He testified that there was physical and verbal abuse and threats. He testified that he was taken to a police station and held sometimes for one day or three days or five days. He testified that this would happen when he went out for bread or other errands and that it happened because of his black hair and dark complexion. He was asked whether anything in particular had happened when the war in Chechnya broke out. He was asked if he was arrested. He answered that he was not arrested, officially. He was asked whether there were problems with the government during this time. He testified that the authorities thought that Chechnyans and Armenians were alike. He testified that these things happened all the time in 1995 and 1996. The Court finally

asked him about his statement in his declaration, that he had been arrested in November 1995 and taken into custody with a group of other Caucasians. The Court pointed out that this had been in his declaration and the Court had been attempting to have him testify about it. The respondent's explanation was that he had said there was a war. (*See* Exhibit 2-2, at paragraph 17).

In his declaration, the respondent describes an incident where he was held for three days and three nights without food and water. It says further that when he asked the police why he was being held, he was told that "We were caged because we are animals." (*See* Exhibit 2-2, at paragraph 18-19). The respondent did not testify to this, even when the Court directed him to his application. The Court is thus forced to the conclusion that this portion of the respondent's application is a fabrication. The Court therefore finds that the respondent's application is not credible in this regard.

The Ninth Circuit has held that as long as an adverse credibility is supported by at least one identified ground that is supported by substantial evidence and goes to the heart of the claim, a reviewing body is bound to accept the IJ's adverse credibility finding. *Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003). The Court is satisfied that the matters discussed above satisfy this requirement. On the basis of the foregoing, the Court finds that the respondent's application for relief set out on his I-589 are not credible.

Frivolous application:

The Government has requested that the Court find that the respondent's application for asylum is frivolous. If it is found that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under INA Section 208(d)(4)(A), that alien is permanently ineligible for any benefits under the Act. INA Section 208(d)(6), *See also* 8 C.F.R. Section 208.20. The regulations provide that such a finding may be made only if the Immigration Judge has given the applicant, during the course of the proceedings, sufficient opportunities "to account for any discrepancies or implausible aspects of the claim." 8 C.F.R. Section 208.20.

In the present case, the Government seeks a frivolous finding on the basis of respondent's testimony regarding his U.S. visa and his admission that he lied in the asylum interview about how he obtained this visa. The respondent's explanation is that he was so afraid at the time of the asylum interview, that the asylum application would be completely denied, that he lied. The Court cannot accept this as a satisfactory explanation. The Court understands that asylum applicants may well be afraid of having the application denied, but that does not permit them to deliberately lie during the interview.

The next question is whether the matter of the visa is a material one to the asylum application. The respondent has argued, through counsel, that visa fraud is routinely forgiven in the asylum context. The Government has argued, on the other hand, that the visa issue goes to the manner of the

respondent's departure from Russia and his relationship to the Russian authorities.

The Court notes that the respondent has given two conflicting explanations as to how he obtained the visa. The first is that he did not know how the visa came to include the annotation that the bearer was a guest of the Russian consulate. The second was that he got it through an old school friend, but did not know how the school friend got it and he did not know what the school friend was doing in Russia at the time. He testified that he gave this person $3000 as to a friend, because that is the way things are done in Russia. The Court does not know which of these is true and the respondent's explanation that he did this because he was afraid is not sufficient. The question remains as to the respondent's connections with the Russian government. The respondent's conflicting explanations leave open the possibility of closer connections with the Russian government that then call into question whether he could not have been protected and whether he suffered the persecution that he says he did. Further, as the Government pointed out in closing arguments, the visa application by the respondent did not disclose family members that he had in the United States which was a motive for fabrication of his claim.

For the foregoing reasons, the Court finds that the respondent has been given adequate opportunity to explain his admitted fabrication. The Court finds that the explanation is inadequate. The Court will, therefore, find that the respondent has deliberately fabricated a portion of his asylum application. And the Court therefore finds that he

has filed a frivolous application under Section 208 of the Act.

Asylum and Withholding of Removal:

An applicant for asylum or withholding of removal bears the evidentiary burden of proof and persuasion. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. 1208.14, 1242.17(c).

An applicant for asylum must meet the statutory definition of a "refugee" which is defined as an individual who is unwilling or unable to return to his country of nationality because of past persecution or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group or political opinion. INA Section 101(a)(42)(A).

To establish that his fear is well-founded, the respondent must show that it is both subjectively genuine and objectively reasonable through credible, direct and specific evidence which demonstrates that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort, the persecutor is aware or could become aware that he possesses this belief or characteristic, the persecutor has the capability of punishing him, and the persecutor has the inclination to punish him. *Mogharrabi, supra.*

An applicant for withholding of removal must demonstrate a clear probability of persecution on account of one or more of the statutorily enumerated grounds. *INS v. Stevic*, 467 U.S. 407 (1984).

The Court in *Stevic* held that the "clear probability" standard requires a showing that it is more likely than not that he would be subject to persecution.

The Supreme Court has held that the terms "well-founded fear" and "clear probability" are significantly different and that the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In the present case, the Court has found for the reasons discussed above, that the respondent's application for asylum is not credible. The Court will, therefore, find that the respondent has demonstrated neither past persecution nor a well-founded fear of future persecution. The Court notes its finding that the respondent submitted a frivolous application for asylum in the United States. The Court finds that even if the frivolous application is reversed on appeal, that the Court's credibility finding is a sufficient basis for its finding that the respondent has not met the requirements of the law for asylum. The respondent's application for asylum will therefore, be denied.

It follows from the foregoing that if the respondent has not carried the lower burden required for asylum under the Act, he cannot carry the higher burden required for withholding. The Court must therefore find that the respondent has not demonstrated that it is more likely than not that he would be subject to persecution on a protected ground if he is required to return to Russia. The Court will, therefore deny his application for withholding of removal under the Act.

Convention Against Torture:

Aliens in exclusion of deportation or removal proceedings on or after March 22nd, 1999, may apply for relief under the United Nations Convention Against Torture. (Grans Convention Against Torture) *See* 8 C.F.R. 1208.18(b)(1); *also see* 8 C.F.R. Section 1208.16 and 1208.17.

The applicant for relief under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he would be tortured if he removed to the proposed country of removal. 8 C.F.R. 1208.16(c)(2). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible, *see i.d.*; *See also Matter of Y-B*, Int. Dec. 3337 (BIA 1998). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including: 1) evidence of past torture inflicted upon the applicant; 2) evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; 3) evidence of gross, flagrant or mass violations of human rights within the country of removal; or 4) other relevant information of conditions on the country of removal. *See* 8 C.F.R. Section 1208.16(c)(3).

In the present case, the Court finds the respondent ineligible for relief under the Convention Against Torture because he has not proven that it is "more likely than not" that he will be tortured if forced to return to Russia. In arriving at this conclusion, the following factors were considered: the Court notes first its finding that the respondent's application set out on the form I-589 is not credi-

ble. This application is not only the respondent's application for asylum, but also for relief under the Convention Against Torture. The Court recognizes that there are separate evidentiary standards to be applied for the two forms of relief. The Court finds as to the respondent's Torture Convention claim, that what the Court has found to be his incredible testimony about being beaten while in custody and his inability to recall the 1995 detention referred to in his declaration are material to his claim that he would be tortured by the government or with government acquiescence if he is required to return to Russia. The Court finds that in this regard, the Court's adverse credibility finding is equally applicable to this application for relief under the Torture Convention. The Court further finds that the respondent's admitted lies about the manner in which he obtained a U.S. visa that indicated that he was a guest of the Russian consulate in Seattle, Washington, lead to questions about his ties to the Russian government that do not support the conclusion that he is more likely than not to be tortured by that government or with its acquiescence if he is required to return to Russia. The Court will, therefore deny his application for relief under the Torture Convention.

Voluntary Departure:

All four respondents have also applied for voluntary departure under INA Section 240B(b)(1), which requires that each show physical presence in the United States for at least one year immediately preceding the date of service of the Notice to Appear, good moral character for at least five

years immediately preceding the application, a showing that none is deportable under INA Section 237(a)(2)(iii) or 237(a)(4), and clear and convincing evidence of the means and intent to depart the United States.

In the present case, the respondent has admitted lying at his asylum interview as described above, the record reflects that he was under oath at the time that he did this, this interview took place on April 10th, 2002, which is within the five year statutory period for which good moral character is required, the Court finds that the respondent gave false testimony to obtain a benefit under the Act. The Court will therefore find that the male respondent is precluded from establishing the necessary good moral character to be eligible for voluntary departure. *See* INA Section 101(f)(6). The Court has also found that the respondent submitted a frivolous application for asylum in the United States. In light of that finding, he is further ineligible for voluntary departure.

The respondent Marina Nikolayvena Maryanyan, was also examined as regards her application for voluntary departure. She testified that she was not present at her husband's asylum interview, but was waiting in the hallway. She testified that she and her husband discussed his testimony at the interview and that she was aware that his testimony was false. She testified that she thought about getting back to the asylum officer about this, but did not know what to do. She testified that when the lead respondent's asylum application was recommended for approval, she did not think to say he had testified falsely at that hear-

ing. She testified that she thought that the agency's recommendation for the approval of the asylum application was enough for the family to obtain legal status. The Court finds no statutory bar for this respondent to establish good moral character. The Court finds, however, in the exercise of discretion, that her knowledge of the falsehoods in her husband's testimony, her failure to do anything about it, and her willingness to accept benefits that she knew were based on false testimony are negative discretionary factors for purposes of her application for voluntary departure. In light of the foregoing, the Court will deny her application for voluntary departure.

The two remaining applicants for voluntary departure are the two daughters, Aleksandra Mersenovna Maryanyan and Narina Mersenovna Maryanyan, played no role to the Court's knowledge in the lead respondent's false testimony. Further, there is no evidence that they had any knowledge of this. In light of this, the Court will find that these two respondents appear statutorily eligible for voluntary departure and their applications will be granted in the exercise of discretion.

For the foregoing reasons and after considering all evidence of record in this case, the following orders will be entered in this case:

ORDER

IT IS ORDERED that the applications of all four respondents for asylum under INA Section 248 be and hereby are DENIED;

IT IS FURTHER ORDERED that the application of Mersen G. Maryanyan for withholding of removal under INA Section 241(b)(3) be DENIED;

IT IS FURTHER ORDERED that the applications of Mersen G. Maryanyan and Marina Nikolayevna Maryanyan be and hereby are DENIED;

IT IS FURTHER ORDERED that in lieu of an order of removal, the respondents, Narina Nersenovna Maryanyan and Aleksandra Nersenovna Maryanyan be granted voluntary departure without expense to the Government on or before July 22nd, 2005 or any extension beyond such date as may be granted by the appropriate authorities in the Department of Homeland Security and under such conditions as they shall impose.

IT IS FURTHER ORDERED that the two respondents granted voluntary departure post a voluntary departure bond in the amount of $500 each within five business days to the appropriate authorities in the Department of Homeland Security.

IT IS FURTHER ORDERED that if either of the two respondents granted voluntary departure fail to post the required bond within five days or to depart when and as required, the above order shall be withdrawn without further notice or proceedings as to that respondent and the following order shall thereupon become immediately effective:

That respondent shall be removed to Russia contained in the Notice to Appear.

IT IS FURTHER ORDERED that the respondent Mersen G. Maryanyan be removed and deported to Russia on the charges contained in the Notice to Appear;

IT IS FURTHER ORDERED that the respondent Marina Nikolayevna be removed and deported to Russia on the charges contained in the Notice to Appear.

ROBERT YEARGIN
Immigration Judge

May 23, 2005